Managing Conflict

Lessons learned from Idaho's Snake River Basin Adjudication

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Recently a small delegation of water leaders from California were invited to Boise, Idaho to observe and participate in a conference highlighting the 27-year long process that resulted in the Snake River Basin Adjudication (SRBA), the largest adjudication ever in the West. Simultaneous to the conference in Boise, the California legislature was in the final week of session debating historic legislation to regulate that state's groundwater management. Although surface water rights in California have been regulated since 1914, groundwater in California had not been subject to significant state regulations.

The legislation that ultimately was approved late that week ushered California into a new era of groundwater management. Consequently the conference in Boise provided a timely opportunity to interact with Idaho water policy leaders and learn firsthand from their experiences related to implementing and managing surface and groundwater water conjunctively in a regulated environment.

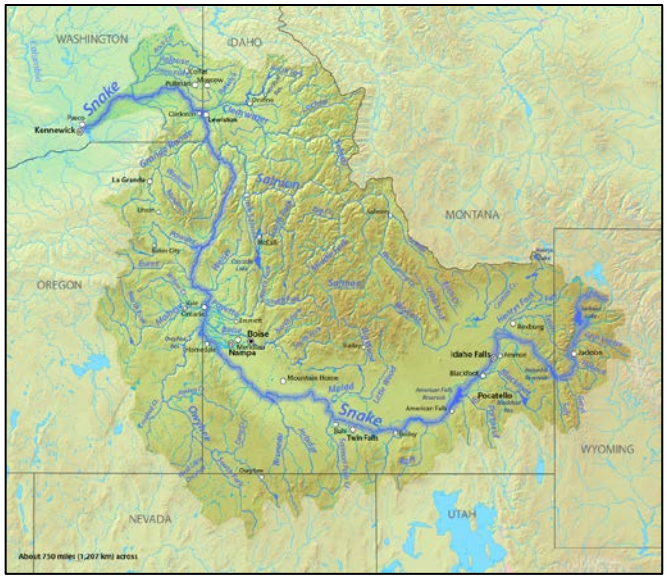
What follows is a brief report on what we observed, heard and learned from that visit.

CONFLICT AND APPROACH

The state of Idaho has regulated water use, both surface and groundwater, for many decades. The Idaho Legislature determined that groundwater was subject to appropriation in 1951. Since that time, the Idaho Department of Water Resources (IDWR) has been the lead agency overseeing water rights, the issuance of permits and resource planning.

The Snake River Basin includes about 85 percent of Idaho's landmass and water rights. The area is equivalent in size to our Sacramento River and its tributaries. Over the years conflicts arose over water rights between upstream water users and water for power generation. The Swan River Controversy, as it became known, resulted in costly litigation. The legal proceedings served a useful purpose to focus attention on the concerns about the uncertainty of future water availability, but failed to resolve the conflicts.

By 1984 then-Governor John Evans, Attorney General Jim Jones and Idaho Power Chief Executive Officer James Bruce agreed that they had "reached the point of diminishing returns in pursuing further judicial resolution of this water rights controversy."



The Snake River Basin includes about 85 percent of Idaho's landmass and water rights. Source: USGS and modified with terrain data from DEMIS Mapserver.

This realization led to an agreement signed by the three leaders entitled *Framework for Final Resolution of Snake River Water Rights Controversy*. The following is an excerpt from that framework agreement describing a new approach to resolving the long standing water right disputes.

"Litigation is not the most efficient method to resolve complex public policy questions. Moreover, adversary proceedings may not necessarily yield solutions which reflect the broad public interest as well as the interests of the proceeding's participants. In order to resolve the controversy and settle the pending litigation, we have identified a series of judicial, legislative and administrative actions which we agree should be taken in the public interest, and which would resolve the outstanding legal issues to our mutual satisfaction."

The settlement discussion focus included:

- Establishing minimum flows for the Snake River
- Limiting new development based on water availability to protect agriculture and hydropower water rights; commence a general adjudication of the entire Snake River in Idaho
- Encouraging the establishment of an effective water marketing system
- Initiating and sustaining state-funded hydrologic and economic studies to determine the most cost effective and environmentally sound means to implement the state water plan and manage Snake River flows, and
- Creating legislation to clarify that proceeds from water rights sold would benefit rate-payers.

At the outset of the adjudication process it was acknowledged that this would be a lengthy process in need of a long-term commitment from all three branches of state government. During the course of the proceedings the conflict that began as a struggle between hydropower and irrigators escalated to groundwater *vs.* surface water users and then groundwater *vs.* aquaculture.

The commitment to deal with these conflicts during the ensuing three decades included six gubernatorial administrations: Democrats John V. Evans and Cecil D. Andrus and Republicans Phil Batt, Dirk Kempthorne, Jim Risch and C.L. "Butch" Otter.

The Legislature committed more than $3 million each year. All told, it cost the state more than $97 million.

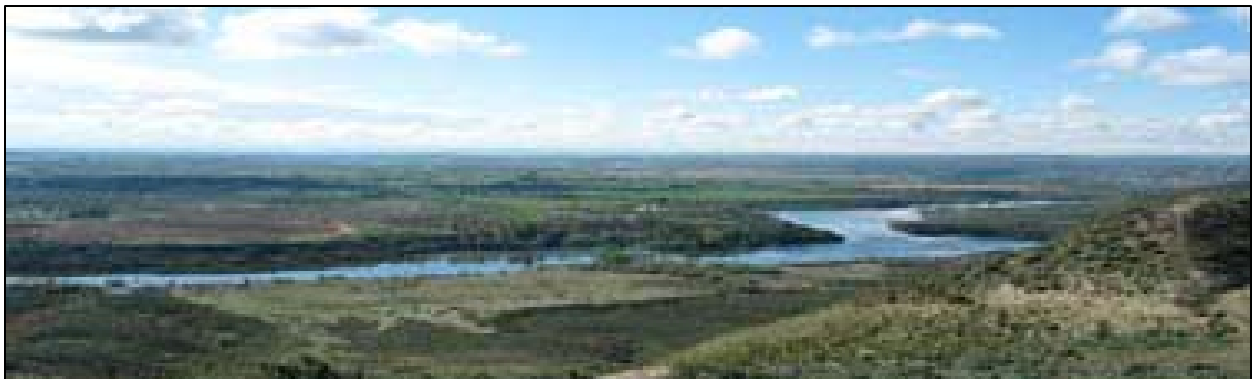
Establishing a court house in Twin Falls instead of Boise placed the court in a more central and convenient location. Photo: Randy Stapilus

The Idaho Supreme Court appointed a District Court Judge, the Honorable Judge Daniel C. Hurlbutt, to preside over the petition for General Adjudication of Water rights in the Snake River Basin. A special court house was established in Twin Falls, a location considered more convenient for the water rights holders. During the 27 years, Judge Barry Wood, Judge Roger Burdick and Judge Eric Wildman each served successively after the retirement of Judge Hurlbutt.

Some of the things we learned about and from the Idaho process include:

CLEAR OBJECTIVES

- The need to clarify Federal and Tribal water rights.
- The need to let people know where their water rights, both surface and groundwater rights, lined up under Idaho's priority rights system.
- Ironically there was a need to quantify water rights because of the perceived threat that water could be exported to California.
- The need to determine the quantity of water available for future development.



Snake River in Hagerman Fossil Beds National Monument, Idaho. The extraordinarily flat and expansive Snake River Plain was the result of the Lake Bonneville floods and the Yellowstone Hotspot. Photo: National Park Service.

FUNDING

The state tried unsuccessfully to charge the Federal government a fee to help pay for the adjudication process. As mentioned above, the Idaho Legislature eventually committed $97 million.

LEARN FROM OTHERS

Prior to issuing his Commencement Order, Judge Hurlbutt visited with leaders in several western states to learn as much as he could about how to structure a successful process. Much of the SRBA success can be attributed to Judge Hurlbutt's early research and the wisdom he applied to initiating a very effective process.

VENUE

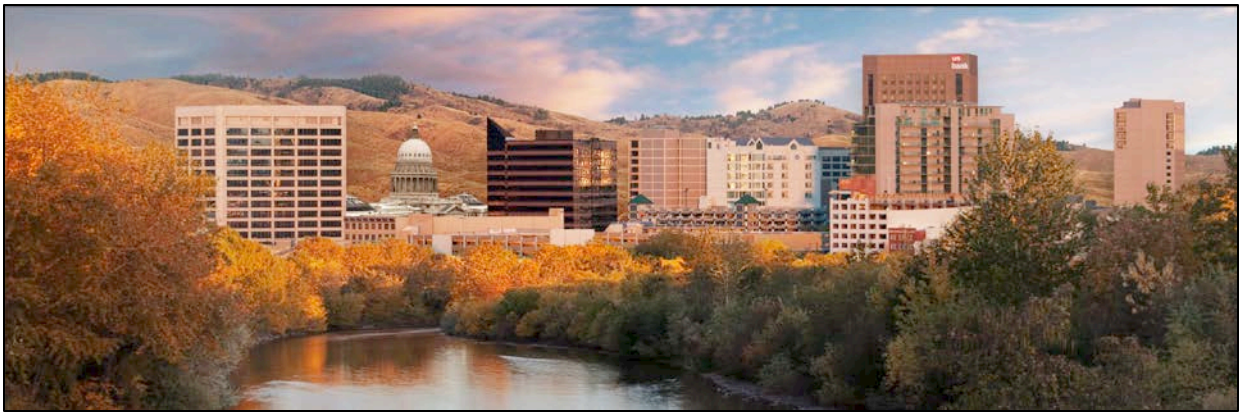
Establishing a court house in Twin Falls instead of Boise placed the court in a more central and convenient location. In addition to the centralized court house, the Judge regularly traveled in the region and held court in remote locations.

STEERING COMMITTEE

Judge Hurlbutt formed a steering committee that met regularly to monitor and advise the Judge when the process was initiated. This was helpful and acknowledged that the adjudication process materially affected a number of interests that needed to be involved with the process.

SPECIAL MASTERS

It was evident from the start that state magistrates were too busy with their normal case loads. That is why a District Court Judge was assigned to oversee the process. In support of the process, special masters were assigned to handle field investigations and to help centralize knowledge in support of the process and the Judge.



Boise, Idaho, was the site of an August conference highlighting the 27-year-long process that resulted in the largest basin adjudication ever in the West. Photo: City of Boise.

INVENTORY OF WATER RIGHTS

Perhaps obvious, but none-the-less imperative to successfully resolving disputes, was the need to create an inventory of water rights.

MONTHLY INFORMATION MEETINGS

Monthly the court provided progress reports for the public and all interested parties.

SETTLEMENT FIRST

The Idaho Department of Water Resources (IDWR) served as the court's technical expert. The process required the Director of IDWR to meet with water rights holders to reach settlements and provide the Twin Falls courthouse with a monthly Director's Report describing the settlements reached for court review and approval. If the Director was unable to achieve a settlement, subsequent appeals then went directly to the SRBA Court in Twin Falls. The Idaho Supreme Court mandated that any appeals out of the Twin Falls court were to go directly to the Supreme Court and were then to be treated on an expedited basis. This process worked well and is credited with successfully resolving most of the complaints without the need for costly litigation.

APPEALS

The Supreme Court, in support of the settlement, required all appeals to go to the SRBA court first. This was to ensure that the appeals were presented to a District Court Judge intimately familiar with the issues.

OUTREACH AND CASE MANAGEMENT

The outreach by the State of Idaho was remarkable. Not only did this include siting the Courthouse centrally in the region in respect to citizens who had to travel, but also to the extensive mailing of information and the mobile IDWR units that travelled across the region holding public meetings, the helping of local farmers and ranchers complete the paperwork and verify that claims were filed correctly, and the opening of IDWR district offices. With 156,000 claims to process it was necessary to create a separate file for every claim.

TECHNOLOGY

Technology helped develop a fair and transparent system that was extensively used during the life of this process to provide and manage information necessary to support effective outcomes.

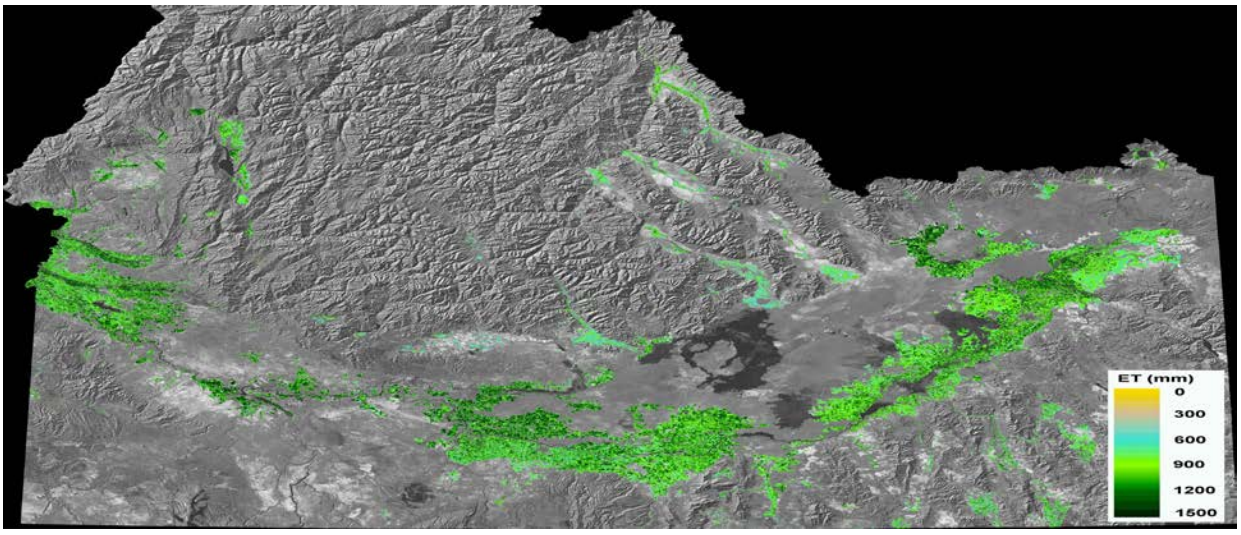
- The inventory of existing water wells in the basin began with a list of wells that had been issued permits by IDWR since 1961. To validate the IDWR list, satellite-imaging technology was enlisted to map all wells. In the words of one Idaho official, this led to a list of "x plus a bunch." Apparently not all wells in use had been documented by IDWR.

- Effectively managing groundwater required the need to develop a groundwater model for the Snake River Basin, which is an area about the size of California's Sacramento River watershed. Initially IDWR staff began with a widely used U.S. Geological Survey (USGS) model created the first comprehensive groundwater model. A modeling committee that represented all the various parties managed decisions on the model development, calibration and validation. Peer review of select aspects of the model also strengthened the trust in the model results.

- The University of Idaho Water Resources Research Institute was invited to assist and helped further refine the model that IDWR manages very effectively now. Today, version 2.1 of The Snake River Aquifer Model provides IDWR with up to date and accurate data regarding surface and groundwater rights and is the tool employed to inform decisions when curtailment notices are necessary. A former Director of IDWR told us, "many aspects of the adjudication have been challenged in court, but the model to date has not."

- The early application of GIS also made the recording of water rights available for landowners to verify that maps of water rights were accurate and contributed to the transparency and fairness of the process. IDWR also pursued support from NASA and collaborated with the University of Idaho to develop methods for estimating water use (evapotranspiration) remotely that resulted in greater efficiencies in tracking water.

  This innovative application of technology resulted in IDWR receiving the Smart Government Award from the Harvard School of Government: http://www.ash.harvard.edu/Home/News-Events/Press-Releases/Mapping-Evapotranspiration-Wins-Innovations-Award or https://www.youtube.com/watch?v=oNcZ8Ogk4zc.



The IDRW and the University of Idaho developed METRIC (Mapping Evapotranspiration at high Resolution with Internalized Calibration) that uses Landsat satellite data to compute and map evapotranspiration (ET). This image shows agricultural ET for Southern Idaho, which IDWR says is critical for settling water-resource conflicts since irrigated agriculture accounts for more than 90% of the consumptive water-use in Idaho. Source: IDWR.

- Commitment to technology has continued with new technology being used recently to determine groundwater levels utilizing telemetry from drones. This has been used effectively to update and maintain the groundwater model.

CONCLUSION

The complexity and the success of the SRBA are compelling. Twenty-seven years sounds like a long time. Idaho started after attempts in other western states and is the first adjudication on this scale to be completed. The most successful water rights adjudication ever in the West was the result of an agreed upon problem statement, a shared goal to resolve the problem because it was the right thing to do, an enduring commitment from all three branches of state government to stay the course even when the conflicts among water rights holders escalated, a coordinated and well thought out approach to resolve 156,000 claims, utilization of best available technology and science and an acknowledgement that a settlement first approach was preferable to endless litigation.

U.S. Supreme Court Justice Antonin Scalia, speaking in Boise, said "Adjudication serves a noble purpose. It lets people of Idaho know just what they own. Everything from farming to fishing to mining and manufacturing requires water. Each of these will go smoothly now that they know what they own."

The process was not perfect and it will continue to be difficult, but the Idaho experience illustrates what can be done. What started as a struggle between hydropower and irrigators, escalated to groundwater *vs.* surface water users and then groundwater *vs.* aquaculture. Yet the continued commitment to stop neighbor *vs.* neighbor or surface water *vs.* groundwater users has yielded significant dividends, even in a state not noted for its commitment to government regulation.

Change is not easy; many of the pioneers who pushed these concepts on the legal, technical and management side were criticized. Although now this is recognized as an extraordinary achievement and the right thing to do for the people of Idaho, several public servants suffered professionally. This may be inevitable, but consideration should be given to protecting public servants who have nothing to gain from the outcomes and implementing what is right in their best professional judgment.

California has recently entered into a new frontier of groundwater management and regulation. Combined with the century-old surface water rights system, successfully merging surface and groundwater management conjunctively will require cooperation, commitment, flexibility and leadership. We should consider the experience of Idaho and other western neighbors, seeking to learn as much as we can to ever more effectively manage our precious natural resource, water.